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In The Supreme Court of the United States

DELBERT WILLIAMSON, et al.,

Petitioners,

vs.

MAZDA MOTOR OF AMERICA, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where Congress has provided that compliance with a federal motor vehicle safety standard "does not exempt a person from liability at common law," 49 U.S.C. § 30103(e), does a federal minimum safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts in certain seating positions impliedly preempt a state common-law claim alleging that the manufacturer should have installed a lap/shoulder belt in one of those seating positions?

2. Under this Court's recent ruling in *Wyeth v. Levine*, __ S. Ct. ___, 2009 WL 529172 (2009), does a federal motor vehicle safety standard allowing vehicle manufacturers to install either lap-only or lap/shoulder seatbelts impliedly preempt a state tort suit alleging that the manufacturer should have warned consumers of the known dangers of a lap-only seatbelt installed in one of its vehicles?

PARTIES

Thanh Williamson, the decedent, was killed in a head-on collision when her body "jackknifed" around a lap-only seatbelt installed in one of the seats of her family's 1993 Mazda MPV Minivan. There was no lap/shoulder seatbelt installed in her seating position. The other occupants of the vehicle were seated in positions equipped with lap/shoulder seatbelts and survived the crash.

Petitioners Delbert and Alexa Williamson are the decedent's surviving husband and daughter. Petitioner Estate of Thanh Williamson is the estate of the decedent. Respondents Mazda Motor Corporation and Mazda Motor Corporation of America, Inc. dba Mazda North American Operations (collectively "Mazda") manufactured the Mazda MPV Minivan at issue here.

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The published opinion of the California Court of Appeal, Fourth Appellate District, Division Three is reported at *Williamson v. Mazda Motor of America, Inc.*, 167 Cal. App. 4th 905, 84 Cal. Rptr. 3d 545 (Cal. Ct. App. 2008). The California Supreme Court's order denying discretionary review is unreported, No. S168717. App. 31.

JURISDICTION

The California Court of Appeal's decision was issued on October 22, 2008. App. 1. The California Supreme Court denied discretionary review on February 11, 2009. App. 31. This Court has jurisdiction to review the federal preemption issues decided by the California Court of Appeal under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This petition raises a federal preemption issue under the Supremacy Clause of the United States Constitution. The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or

Laws of any State to the Contrary notwithstanding." U.S. Const. Art. 6, cl. 2.

The California Court of Appeal ruled that petitioners' lawsuit was preempted by Federal Motor Vehicle Safety Standard ("FMVSS") 208. The National Traffic and Motor Vehicle Safety Act ("Safety Act") defines a "motor vehicle safety standard" as "a minimum standard for motor vehicle or motor vehicle equipment performance." 49 U.S.C. § 30102(a)(9). The savings clause of the Safety Act provides: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e).

In 1967, the National Highway Traffic Safety Administration ("NHTSA") adopted the first set of federal motor vehicle standards pursuant to the Safety Act. 32 Fed. Reg. 2408 (Feb. 3, 1967). In the preamble, NHTSA made "findings . . . with respect to all standards." *Id.* at 2408. These included the following: "Each standard is a minimum standard for motor vehicle or equipment performance which is practicable and meets the need for motor vehicle safety. . . ." *Id.*

As originally enacted in 1967, FMVSS 208 allowed manufacturers to install either lap-only (Type 1) or lap/shoulder (Type 2) seatbelts in all rear seating positions of passenger vehicles. The relevant portion of the 1967 regulation stated: "Except as provided in S3.1.1 and S3.1.2, a Type 1 or Type 2 seat belt assembly that conforms to Motor Vehicle Safety

Standard No. 209 shall be installed in each passenger car seat position." *Id.* at 2415.

In 1989, NHTSA adopted two new regulations amending FMVSS 208 and mandating that passenger vehicles "shall be equipped with an integral Type 2 [lap/shoulder] seat belt assembly at every forward-facing rear outboard designated seating position." 54 Fed. Reg. 46257, 46266 (Nov. 2, 1989); 54 Fed. Reg. 25275, 25278 (June 14, 1989). The regulations defined a "rear outboard designated seating position" to mean "any 'outboard designated seating position' (as that term is defined at 49 CFR 571.3) that is rearward of the front seat(s), except any designated seating position adjacent to a walkway located between the seat and the side of the vehicle, which walkway is designed to allow access to more rearward seating positions." 54 Fed. Reg. 46257, 46266 (Nov. 2, 1989).

NHTSA specifically concluded that lap/shoulder belts are safer and more effective than lap-only belts in rear seating positions. 54 Fed. Reg. 46257, 46257-46258 (Nov. 2, 1989); 54 Fed. Reg. 25275, 25275-25276 (June 14, 1989). On the issue of compatibility with car seats, NHTSA stated: "[T]he agency believes that this proposal would offer benefits for children riding in some types of booster seats, would have no positive or negative effects on children riding in most designs of car seats and children that are too small to use shoulder belts, and would offer older children the same incremental safety protection that would be

afforded adult rear seat occupants." 53 Fed. Reg. 47982, 47988-47989 (Nov. 29, 1988).

When it adopted the 1989 regulations, NHTSA decided not to require lap/shoulder belts for rear-center seating positions solely because it found "that there are more technical difficulties associated with any requirement for lap/shoulder belts at center rear seating positions, and that lap/shoulder benefits at center rear seating positions would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task." 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989); *see also* 53 Fed. Reg. 47982, 47984 (Nov. 29, 1988).

NHTSA also decided not to mandate lap/shoulder belts for the aisle seats of multi-passenger vehicles, such as Thanh's seat in the Mazda MPV Minivan. The basis for this decision was a concern "that locating the anchorage for the upper end of the shoulder belt on the aisle side of the vehicle would stretch the shoulder belt across the aisleway and cause entry and exit problems for occupants of seating positions to the rear of the aisleway seating position." 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989). However, NHTSA stated: "Of course, in those cases where manufacturers are able to design and install lap/shoulder belts at seating positions adjacent to aisleways without interfering with the aisleway's purpose of allowing access to more rearward seating positions, NHTSA encourages the manufacturers to do so." *Id.* at 46258.

The 1989 regulations were in effect when the Williamsons' 1993 Mazda MPV Minivan was manufactured. In December 2002, President George W. Bush signed into law "Anton's Law," which required NHTSA to issue a new rule mandating installation of lap/shoulder belts in *all* rear seating positions of passenger vehicles. Pub.L. 107-318, § 5, 116 Stat. 2772 (Dec. 4, 2002) (quoted in Historical and Statutory Notes following 49 U.S.C.A. § 30127). NHTSA issued a new rule requiring lap/shoulder belts in all rear seating positions in December 2004. 69 Fed. Reg. 70904 (Dec. 8, 2004). In doing so, NHTSA confirmed that FMVSS 208 was "not intended to preempt state tort civil actions" except in one narrowly defined area not relevant here. *Id.* at 70912.

STATEMENT OF THE CASE

On August 14, 2002, Delbert Williamson and his wife, Thanh Williamson, were traveling with their daughter Alexa in their 1993 Mazda MPV Minivan. They were driving north on Route 89 in Kane County, Utah. Delbert was the driver, Thanh was seated in the right-hand aisle seat of the middle row, and their daughter was seated immediately to her left directly behind the driver's seat. Delbert and Alexa were both

wearing lap/shoulder seatbelts. Thanh was wearing a lap-only seatbelt. AA 283, 285; ARB at 8, n.1.[1]

A motor home towing a Jeep Wrangler was traveling in the opposite direction on Route 89. Suddenly, the Jeep Wrangler became detached from the motor home. The Jeep Wrangler crossed into oncoming traffic and struck the Williamsons' van. AA 283, 285.

Thanh was killed when the forces of the collision caused her body to "jackknife" around her lap-only seatbelt, resulting in severe abdominal injuries and internal bleeding. Delbert and Alexa suffered non-fatal injuries. AA 283, 285.

Thanh's survivors and her estate filed suit in California state court, asserting state tort claims including products liability and negligence. The Third Amended Complaint alleged in relevant part: (i) Thanh's seat should have been equipped with a lap/shoulder belt to restrain her upper torso in a frontal collision; and (ii) Mazda failed to adequately warn plaintiffs of the known hazards, risks, and dangers of the lap-only seatbelt installed in Thanh's seating position. AA 289-295.

In a motion for judgment on the pleadings and a subsequent demurrer, Mazda asserted that these

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[1] All citations to "AA" refer to the Appellants' Appendix filed in the California Court of Appeal. "ARB" refers to the Appellants' Reply Brief filed in the California Court of Appeal.

state law claims were preempted by FMVSS 208 under the Supremacy Clause of the United States Constitution. AA 55-66, 324-336. Mazda argued that the claims were preempted because they were in conflict "with the choice that federal law gave to manufacturers to choose which type of safety belt they would install in those center seats." AA 56. The trial court ultimately sustained Mazda's demurrer without leave to amend as to all of plaintiffs' claims arising out of the death of Thanh Williamson. AA 543-544.

In a published opinion, the California Court of Appeal affirmed the judgment. *Williamson v. Mazda Motor of America, Inc.*, 167 Cal. App. 4th 905, 84 Cal. Rptr. 3d 545 (Cal. Ct. App. 2008). Applying the doctrine of implied obstacle preemption under *Geier* and the Supremacy Clause, App. 6-24, the California Court of Appeal ruled that "FMVSS 208 preempts common law actions alleging a manufacturer chose the wrong seatbelt option. . . ." App. 24. The court ruled that the failure to warn theory of liability was "also barred by federal preemption." App. 26.

Plaintiffs filed a Petition for Review in the California Supreme Court solely on the federal preemption issue. The California Supreme Court denied discretionary review on February 11, 2009. App. 31.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER COMMON-LAW CLAIMS FOR FAILURE TO INSTALL LAP/SHOULDER SEATBELTS ARE IMPLIEDLY PREEMPTED BY FMVSS 208 AND TO RESOLVE CONFLICTS IN THE LOWER COURTS OVER THE MEANING OF *GEIER* AND *SPRIETSMA*

A. Introduction

The California Court of Appeal followed a growing body of federal and state case law that has broadly construed this Court's 5-4 preemption decision in *Geier v. American Honda Company, Inc.*, 529 U.S. 861 (2000) and narrowly construed its unanimous "no preemption" decision in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). As construed by these lower courts, *Geier* purportedly holds "that when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted." *Hurley v. Motor Coach Industries, Inc.*, 222 F.3d 377, 383 (7th Cir. 2000). *Accord Carden v. General Motors Corp.*, 509 F.3d 227, 230-31 (5th Cir. 2007); *Griffith v. General Motors Corp.*, 303 F.3d 1276, 1282 (11th Cir. 2002); *Heinricher v. Volvo Car Corp.*, 61 Mass. App. Ct. 313, 318-19, 809 N.E.2d 1094 (Mass. App. Ct. 2004). Based on this understanding of *Geier*, these courts have ruled that a tort suit challenging a manufacturer's

use of one of the seatbelt options allowed by FMVSS 208 is preempted by federal law.

These courts have also concluded that *Sprietsma*'s holding – that a federal agency's decision not to mandate a particular safety device has no preemptive effect unless it reflects an authoritative federal policy against the device – applies only when there is a "complete absence of regulatory action." *Carden*, 509 F.3d at 232; *Roland v. General Motors Corp.*, 881 N.E.2d 722, 728-29 (Ind. App. 2008).

These interpretations of *Geier* and *Sprietsma* are wrong and they conflict with the decisions of other appellate courts. Certiorari should be granted to resolve these conflicts and to preserve the cooperative federalist scheme contemplated by Congress when it enacted the Safety Act. Congress expressly allowed state tort law to continue to operate in conjunction with the federal "minimum" standards to achieve greater vehicle safety. 49 U.S.C. §§ 30102(a)(9), 30103(e). By preempting state tort suits that seek to impose higher common-law standards, these cases frustrate the intent of Congress and undermine its fundamental goal of achieving vehicle safety.

B. *Geier* Was Based on the Unique Regulatory History of the 1984 Regulations on Passive Restraints in Front Seating Positions

In *Geier*, the plaintiff filed a state tort claim alleging that her vehicle was defective because the

front driver's seat was not equipped with an airbag. The issue was whether the 1984 version of FMVSS 208 relating to "passive restraints" in front seating positions preempted a state common-law tort action alleging that the defendant manufacturer should have equipped its vehicle with front airbags.[2]

Geier first held that the express preemption clause of the Safety Act, 49 U.S.C. § 30103(b)(1), did *not* preclude state tort liability. Based on the Act's savings clause, 49 U.S.C. § 30103(e), the Court concluded that Congress intended to "leav[e] adequate room for state tort law to operate – for example, where federal law creates only a floor, *i.e.*, a minimum safety standard." *Geier*, 529 U.S. at 868. The Court therefore found that the Safety Act "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Id.* at 870.

The Court next considered whether the savings clause foreclosed "the operation of ordinary pre-emption principles insofar as those principles instruct us to read statutes as preempting state laws (including

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[2] The passive restraints regulation at issue in *Geier* did not apply to rear seating positions. 49 Fed. Reg. 28962 (July 17, 1984). "Passive restraints" are "devices that do not depend for their effectiveness on any action by the vehicle occupant," such as "airbags and automatic seatbelts." *Geier*, 529 U.S. at 889-90 (Stevens, J., dissenting). Manual seatbelts are not passive restraints, as they must be fastened manually. *Id.* at 880 (distinguishing between "ordinary manual lap and shoulder seat belts" and "passive restraints").

common-law rules) that 'actually conflict' with the statute or federal standards promulgated thereunder." *Geier*, 529 U.S. at 869. On this issue, the Court ruled that the savings clause "does *not* bar the ordinary working of conflict pre-emption principles." *Ibid.*

Finally, the Court considered whether Geier's state tort claim actually conflicted with the 1984 version of FMVSS 208 relating to passive restraints in front seating positions. *Geier*, 529 U.S. at 874-87. Although *Geier* held "that a court should not find pre-emption too readily in the absence of clear evidence of a conflict," *id.* at 885, the majority opinion concluded that Geier's suit would stand as an obstacle to the objectives of the passive restraint regulations contained in the 1984 version of FMVSS 208. Based on the regulatory history, the Court found that the 1984 regulations were intended to achieve a gradually developing mix of alternative passive restraint devices for front seating positions. *Id.* at 877-81, 886.

The Court concluded that Geier's tort claim conflicted with these regulatory objectives. First, the Court found Geier's theory that state common law imposed a duty to install airbags – as opposed to any other type of passive restraints – "presented an obstacle to the variety and mix of devices that the federal regulation sought." *Geier*, 529 U.S. at 881. Second, the Court noted that Geier's vehicle was manufactured during the initial phase-in period when the 1984 regulation "required only that 10% of a manufacturer's nationwide fleet be equipped with *any*

passive restraint device at all." *Ibid.* Thus, Geier's claim that *all* vehicles manufactured during this period should have been equipped with airbags "would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed." *Ibid.*

From the very first sentence of its opinion, the majority in *Geier* repeatedly emphasized that its ruling was based solely on the *1984* version of FMVSS 208 governing passive restraints in front seating positions. *Geier*, 529 U.S. at 864 ("This case focuses on the 1984 version" of FMVSS 208 regarding "passive restraints"); *id.* at 874-75 (citing 1984 Department of Transportation ("DOT") comments in Federal Register "which accompanied the promulgation of FMVSS 208"); *id* at 877 (referring to "the version [of FMVSS 208] that is now before us"); *id.* at 877 (referring to "DOT's own contemporaneous explanation of . . . the 1984 version of FMVSS 208"); *id.* at 879 (referring to "[t]he 1984 FMVSS 208 standard" on "passive restraints"); *id.* at 881 (summarizing the purpose of "the 1984 version of FMVSS 208"); *id.* at 886 (referring to "the contemporaneous 1984 DOT explanation" of its passive restraints regulation).

Geier is inapplicable here. This case does not involve the unique regulatory history of the 1984 version of FMVSS 208 relating to passive restraint devices in front seating positions. Instead, it involves the *1989* version of FMVSS 208 relating to *manual* seatbelts in *rear* seating positions. Unlike the 1984 airbag regulations, nothing in the regulatory history

of the 1989 regulations suggests that NHTSA intended to achieve a gradual phase-in of a variety of different types of seatbelts in rear seating positions. On the contrary, the agency recognized that lap/shoulder seatbelts were inherently safer and its regulations were intended to achieve "the *earliest possible implementation* of a requirement for rear-seat lap/shoulder belts." 54 Fed. Reg. 25275, 25276 (June 14, 1989) (italics added); *see also id.* at 25277; 54 Fed. Reg. 46257, 46258, 46265 (Nov. 2, 1989).

For these reasons, a state tort suit alleging that all rear seating positions should have been equipped with lap/shoulder belts in 1993 would not stand as an obstacle to the federal seatbelt regulations promulgated in 1989. "Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." *California v. ARC America Corp.*, 490 U.S. 93, 105 (1989).

C. Many State and Federal Courts Have Misconstrued *Geier* and Applied an Overly Broad Interpretation of Its Implied Preemption Holding

As noted, many state and federal courts have interpreted *Geier* to preempt state common-law suits whenever they would foreclose one of several equipment options authorized by a federal motor vehicle safety standard. This overbroad interpretation is not supported by anything in this Court's opinion. The

majority did not base its holding on the mere existence of regulatory options; it relied on evidence that the agency had adopted an authoritative federal policy designed to give vehicle manufacturers a variety of passive restraint choices and achieve a mix of different types of passive restraints in front seating positions. In fact, *Geier* cited earlier Supreme Court authority which it characterized as holding that a state common-law tort theory is preempted only where it "limit[s] the availability of an option *that the federal agency considered essential to ensure its ultimate objectives*." *Geier*, 529 U.S. at 882 (emphasis added & citing *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156 (1982)). Under *Geier*, if the federal agency does *not* consider the availability of a particular option to be essential to its objectives, a common-law theory foreclosing that option does not stand as an obstacle to the agency's goals and is not preempted.

The broad "options always preempt" interpretation of *Geier* is directly contrary to the statutory scheme enacted by Congress. Even when a motor vehicle safety standard provides different options for compliance, it is still by definition only a "minimum standard." 49 U.S.C. § 30102(a)(9). Indeed, when NHTSA first enacted FMVSS 208 and gave manufacturers the option of installing either lap-only or lap/shoulder belts in rear seating positions, the agency confirmed that "all standards" were only "minimum standard[s]." 32 Fed. Reg. 2408, 2408 (Feb. 3, 1967). The agency has never retreated from

this position. Further, the savings clause of the Safety Act provides: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e). By holding that federal law preempts a state tort suit whenever it would foreclose an option permitted by a minimum safety standard, these cases threaten to convert the federal safety floor created by Congress into a national liability ceiling.

These cases are also contrary to the consistently stated views of the agency itself. In *Geier*, the Court relied on amicus briefs submitted by the United States on behalf of the DOT in three different Supreme Court cases. In each of those amicus briefs, the DOT consistently stated its position that "no airbag" lawsuits would conflict with its specific objectives in promulgating the *1984 version* of FMVSS 208 governing passive restraints. *Geier*, 529 U.S. at 883 (quoting Briefs for the United States as Amicus Curiae in *Geier*, No. 98-1911, *Freightliner Corp. v. Myrick*, No. 94-286, and *Wood v. General Motors Corp.*, No. 89-46). *Geier* concluded that the agency's position as to the preemptive effect of its own regulations was entitled to "special weight." *Id.* at 886.

In those very same amicus briefs, however, the DOT specifically rejected the broad theory of implied preemption embraced by the California Court of Appeal's decision. In *Wood*, for example, the federal government's amicus brief stated:

> Respondent argues that FMVSS 208 preempts state tort claims because that standard has always allowed manufacturers to use various types of occupant restraints. [Citations.] We disagree with this reasoning. . . . That state tort law may compel an auto maker as a practical matter to choose one of the options authorized by federal law also does not necessarily establish an actual conflict between federal and state law.

AA 414-415.

Similarly, in *Freightliner*, the amicus brief filed by the United States stated: "Although the majority of courts to have considered the question have concluded that 'no-airbag' suits are preempted, they have done so on a broader theory of implied preemption with which the United States does not agree, i.e., that the existence of 'options' to comply with Standard 208 in itself precludes state-court judgments based on the failure to install one particular option." AA 457-458, n.16.

And in *Geier* itself, the amicus brief for the United States argued: "[S]tate tort law does not conflict with a federal 'minimum standard' . . . merely because state law imposes a more stringent requirement. . . . We therefore agree with petitioners that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose." AA 488 & n.18.

As *Geier* establishes, the DOT's consistently stated views as to the preemptive effect of its own

regulations are entitled to "special weight." *Geier*, 529 U.S. at 886. Because NHTSA has clearly indicated that it does not intend its own regulatory options to preempt all state tort claims that effectively foreclose one of those options, the broad "options always preempt" theory of implied preemption adopted by some lower courts should not be allowed to stand uncorrected.

Other federal and state courts have correctly recognized that "*Geier* does not automatically exempt automobile manufacturers from liability whenever a federal regulation provides them with options as to the type of restraint system to be employed." *Chevere v. Hyundai Motor Co.*, 774 N.Y.S.2d 6, 4 A.D.3d 226, 227 (N.Y. App. Div. 2004); *see also O'Hara v. General Motors Corp.*, 508 F.3d 753, 762-63 (5th Cir. 2007) (holding that NHTSA's decision to give manufacturers an option between laminated or tempered glass for side windows in FMVSS 205 did not preempt tort claim for failure to install laminated glass).

Certiorari should be granted on this issue because the line of cases followed by the California Court of Appeal threatens to undermine the valuable role Congress intended state tort law to play in providing incentives for manufacturers to develop safer vehicles than the federal minimum standards. If allowed to stand, these cases would immunize manufacturers from tort liability whenever they install one of the equipment options permitted by the federal minimum safety standards. That cannot be what Congress had in mind when it stated that compliance

with a motor vehicle safety standard "does not exempt a person from liability at common law." 49 U.S.C. § 30103(e).

D. Many State and Federal Courts Have Misconstrued *Sprietsma* and Applied an Overly Narrow Interpretation of Its Implied Preemption Holding

Two years after *Geier*, this Court decided *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). In a unanimous decision, the Court distinguished *Geier* in ruling that the Coast Guard's "intentional and carefully considered" decision not to mandate boat propeller guards did not preempt a state tort action based on the defendant's failure to install a propeller guard. *Id.* at 67. The Coast Guard's decision was based primarily on "available data" regarding the costs, technical feasibility, and relative safety benefits of mandating a universally acceptable propeller guard for all modes of boat operation. *Id.* at 61-62, 66-67. However, the Coast Guard did not make any "policy" judgment that states "should not impose some version of propeller guard regulation, and it most definitely did not reject propeller guards as unsafe." *Id.* at 67. Because the Coast Guard's cost-benefit analysis did "not convey an 'authoritative message' of a federal policy against propeller guards," this Court found that the plaintiff's tort claim was not preempted. *Id.* at 67-68.

Just as the Coast Guard in *Sprietsma* "did not reject propeller guards as unsafe," *Sprietsma*, 537 U.S. at 67, NHTSA has never rejected lap/shoulder belts as unsafe for non-outboard rear seating positions. On the contrary, the agency recognized in 1989 that lap/shoulder belts are safer and more effective in rear seating positions. 54 Fed. Reg. 46257, 46257-46258 (Nov. 2, 1989); 54 Fed. Reg. 25275, 25275-25276 (June 14, 1989). In 1989, NHTSA decided not to mandate lap/shoulder belts for non-outboard seats primarily because it believed that this still posed "more technical difficulties" and there were "small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task." 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989).[3]

This cost-benefit analysis is indistinguishable from the Coast Guard's reasoning for its decision not to mandate propeller guards in *Sprietsma*. It does "not reflect an 'authoritative' message of a federal policy against" lap/shoulder belts in non-outboard seating positions. *Sprietsma*, 537 U.S. at 67. Just as

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[3] For the type of aisle seat occupied by Thanh Williamson, NHTSA even "encourage[d]" manufacturers to install lap/shoulder belts if they could do so without obstructing the aisle. 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989). By 1993, when the Williamsons' vehicle was manufactured, there *were* technologically and economically feasible ways of anchoring the lap/shoulder belt directly to the seat without obstructing the aisle. Petitioners are not claiming that Mazda had a duty to install a lap/shoulder belt that would have obstructed the aisle.

the Coast Guard "left the law applicable to propeller guards exactly the same as it had been before," *id.* at 65, NHTSA left the law applicable to these seating positions exactly the same as it had been for over 20 years. Under *Sprietsma*, the agency's 1989 decision not to mandate lap/shoulder belts for these seating positions has no preemptive effect.

In refusing to apply *Sprietsma*, the California Court of Appeal followed a recent line of cases holding that *Sprietsma* is strictly limited to situations involving a "complete absence of regulatory action." App. 20 (citing *Carden v. General Motors Corp.*, 509 F.3d 227, 232 (5th Cir. 2007); *Roland v. General Motors Corp.*, 881 N.E.2d 722, 728-29 (Ind. App. 2008)). However, nothing in *Sprietsma* suggests that its holding is so limited. *Sprietsma* itself cannot fairly be characterized as a case involving complete absence of regulatory action. As this Court noted, the Coast Guard had in fact "promulgated a host of detailed regulations" on boat safety and performance, including "the use of specified equipment" and "precise standards governing the design and manufacture of boats themselves and of associated equipment, such as electrical and fuel systems, ventilation, and 'start-in-gear protection' devices." *Sprietsma*, *supra*, 537 U.S. at 60. Thus, *Sprietsma* was a case involving an agency's deliberate and carefully considered decision not to mandate *one particular type* of safety device.

This Court and others have applied *Sprietsma* in circumstances that did not involve a complete absence of regulatory action. *See, e.g.*, *Altria Group, Inc.*

v. Good, 129 S. Ct. 538, 550-51 (2008) (holding that state law claims against tobacco manufacturers for misrepresenting that cigarettes were "light" and had "lowered tar and nicotine" were not preempted by Federal Trade Commission's failure to require correction of misleading statements); *Knipe v. SmithKline Beecham*, 583 F. Supp. 2d 553, 591-93 (E.D. Pa. 2008) (holding that Federal Drug Administration's decision not to mandate additional pediatric warning for drug did not convey an "authoritative message of federal policy" sufficient to preempt a state law failure to warn claim); *MCI Sales and Service, Inc. v. Hinton*, 272 S.W.3d 17, 23-28 (Tex. App. 2008) (holding that FMVSS 208 and NHTSA's decision not to mandate passenger seatbelts on motor coach buses did not constitute clear expression of federal policy sufficient to preempt common-law claim of duty to install passenger seatbelts on motor coach buses); *Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations*, 41 Cal. 4th 929, 945-50 (2007) (holding that United States Fish and Wildlife's extensive regulatory history regarding kangaroo species did "not establish any 'authoritative' policy against state regulation").

Most notably, in a case decided just two weeks before the Fifth Circuit's decision in *Carden*, a different panel of the Fifth Circuit applied and followed *Sprietsma* even though NHTSA had promulgated a specific safety regulation on the exact subject at issue. In *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007), the Fifth Circuit ruled that a

common-law claim alleging that a vehicle should have been equipped with laminated glass windows was not preempted by federal law. Notably, there was a federal regulation in place (FMVSS 205) that specifically gave manufacturers the option of using either laminated or tempered glass for side windows. Even so, the Fifth Circuit found that NHTSA's decision not to mandate laminated glass was based on "cost concerns and minor safety issues" of a type that did "'not convey an authoritative message of a federal policy against'" laminated glass under the holding of *Sprietsma*. *Id.* at 762-63 (quoting *Sprietsma*, 537 U.S. at 67). These are exactly the same types of reasons NHTSA cited when it decided not to mandate lap/shoulder belts for non-outboard seating positions in 1989. 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989).

Certiorari should be granted to resolve this conflict between the lower appellate courts. There is no conceivable reason to confine *Sprietsma* solely to cases involving a complete absence of regulatory action. Whenever a federal agency decides not to impose a particular safety requirement, its decision should have preemptive effect only if it conveys an authoritative message of federal policy against the requirement. Otherwise, state tort suits will be preempted in the absence of any genuine conflict with federal law.

As this Court has recently confirmed, the presumption against preemption fully applies to implied conflict preemption. *Wyeth v. Levine*, ___ S. Ct. ___, 2009 WL 529172, at *5 n.3 (2009). Ordinarily, "the

absence of a federal standard cannot implicitly extinguish state common law." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 282 (1995) (holding that absence of federal safety standard on anti-lock brakes did not impliedly preempt state common-law duty to install anti-lock braking system). Especially in cases where Congress has stated an intention to allow state common law to operate in conjunction with federal law, state tort law should never be displaced by a federal agency's decision not to impose a particular safety standard unless there is "clear evidence of a conflict" between state and federal policies. *Geier*, 529 U.S. at 88.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER COMMON-LAW CLAIMS FOR FAILURE TO WARN ABOUT THE DANGERS OF LAP-ONLY SEATBELTS ARE IMPLIEDLY PREEMPTED BY FMVSS 208

The same line of cases discussed above also held that FMVSS 208 preempts a state tort claim alleging that a vehicle manufacturer had a duty to warn about the known risks of one of the seatbelt options authorized by the federal standard. The California Court of Appeal followed these cases in ruling that petitioners' failure to warn theory of liability was "also barred by federal preemption." App. 26 (citing *Carden* 509 F.3d at 233; *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769-70 (11th Cir. 1998); *Roland*, 881 N.E.2d at 729-30). However, these holdings simply cannot be reconciled

with this Court's recent ruling in *Wyeth v. Levine*, ___ S. Ct. ___, 2009 WL 529172 (2009). Certiorari should be granted on this issue because the lower courts have decided an important question of federal preemption inconsistently with this Court's decision in *Wyeth*.

In *Wyeth*, the federal Food and Drug Administration ("FDA") approved as safe and effective the injectable form of a drug called Phenergan and also approved Wyeth's labeling of the drug. However, the FDA did not mandate additional warnings regarding known risks of the "IV-push" method of administration, whereby the drug is injected directly into a patient's vein. The plaintiff suffered injury from an IV-push injection of Phenergan and sued the manufacturer on a failure to warn theory under state law. *Wyeth*, 2009 WL 529172, at *2-3.

This Court held that the plaintiff's failure to warn theory was not preempted by federal law. First, the Court found that it was possible for Wyeth to comply with a state-law duty to modify Phenergan's labeling without violating the federal labeling requirements. *Wyeth*, 2009 WL 529172, at *7-9. Second, the Court held that imposing a state-law duty to provide a stronger warning would not obstruct the purposes and objectives of the federal drug labeling regulations. *Id.* at *10-13. The Court concluded that Congress intended the Food, Drug, and Cosmetic Act to operate in conjunction with state law to provide broad consumer protection. *Id.* at *10. The Court noted:

> As Justice O'Connor explained in her opinion for a unanimous Court: "The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them."

Id. (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989)).

Under the holding of *Wyeth*, the mere fact that a federal agency has approved a product as safe and effective does not automatically preempt a state-law claim for failure to warn of the product's known risks. In *Wyeth*, this Court expressly ruled that the plaintiff's failure to warn claim was not preempted by the FDA's approval of the drug and its labeling. Similarly, petitioners' failure to warn claim is not preempted by NHTSA's approval of lap-only seatbelts as the minimum federal safety standard for some vehicle seating positions. As in *Wyeth*, Congress has clearly expressed its intention to allow state common law to operate in conjunction with federal "minimum" standards to achieve greater vehicle safety. 49 U.S.C. §§ 30102(a)(9), 30103(e). Requiring vehicle manufacturers to warn consumers about the known risks of lap-only seatbelts is no more of an obstacle to federal law than requiring drug manufacturers to provide stronger warnings about the known risks of a drug approved by the FDA.

Certiorari should be granted on this issue because it is an important question of federal preemption that has been wrongly decided by the lower federal and state courts. To ensure that state tort law continues to play its proper role in achieving greater vehicle safety than just the federal minimum standards, this Court should intervene to correct these erroneous decisions.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that this petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DELBERT WILLIAMSON et al., Plaintiffs and Appellants, v. MAZDA MOTOR OF AMERICA, INC., et al., Defendants and Respondents.	G038845 (Super. Ct. No. 04CC06494) OPINION (Filed Oct. 22, 2008)

Appeal from a judgment of the Superior Court of Orange County, Hugh Michael Brenner, Judge. Request for judicial notice. Judgment affirmed. Request granted.

Niddrie, Fish & Buchanan, Martin N. Buchanan; Law Offices of David J. Bennion, David J. Bennion; Girardi & Keese, David R. Lira, Shahram A. Shayesteh and Howard B. Miller for Plaintiffs and Appellants.

Bowman and Brooke, Brian Takahashi, Robert S. Robinson and David R. Kelly for Defendants and Respondents.

Mayer Brown, Donald M. Falk, Erika Z. Jones and Adam C. Sloane for Alliance of Automobile Manufacturers, Inc., as Amicus Curiae on behalf of Defendants and Respondents.

Hugh F. Young, Jr.; Snell & Wilmer, Richard A Derevan, Gary A. Wolensky and Todd E. Lundell for Product Liability Advisory Council, Inc., as Amicus Curiae on behalf of Defendants and Respondents.

OPINION

RYLAARSDAM, J.

This appeal concerns Federal Motor Vehicle Safety Standard 208 (49 C.F.R. § 571.208 (2008); FMVSS 208), a regulation promulgated under the National Traffic and Motor Vehicle Safety Act (49 U.S.C. § 30101 et seq.; Safety Act), which authorizes automobile manufacturers to install a lap-only seatbelt at the inboard seating positions of a vehicle. The issue is whether the regulation preempts a common law tort action against a manufacturer for not choosing the option to install a lap/shoulder seatbelt at such a position. We conclude that under the United States Supreme Court's decision in *Geier v. American Honda Motor Company, Inc.* (2000) 529 U.S. 861 [120 S.Ct. 1913, 146 L.Ed.2d 914] and its progeny this claim is preempted because it conflicts with FMVSS 208.

In addition, while plaintiffs alleged other grounds for recovery not barred by federal preemption, in light of their concessions the failure to use a lap/shoulder seatbelt was "integral" to the case, we affirm the judgment dismissing the action.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Delbert Williamson, Alexa Williamson, through Delbert as her guardian ad litem, and the Estate of Thanh Williamson sued defendants Mazda Motor of America, Inc. and Mazda Motor Corporation for strict products liability, negligence, deceit, and wrongful death arising from injuries suffered in a front-end motor vehicle collision between their 1993 Mazda MPV Minivan and another vehicle.

According to the second amended complaint, Delbert and Alexa Williamson wore "three-point [lap/shoulder] seatbelts" at the time while Thanh Williamson, "sitting in the middle seat of the [vehicle's] middle row," wore "only . . . a two-point seatbelt or lap[ ]belt." The complaint alleged all three occupants suffered injuries in the crash, but Thanh's injuries were fatal because "the forces generated by th[e] collision caused her body to 'jackknife' around her defective lap[ ]belt, causing severe abdominal injuries and internal bleeding." Plaintiffs claimed defendants were liable because they designed, manufactured, marketed, and sold a minivan that, among other things, "was equipped with inferior . . . two-point lap[ ]belts in the middle seating positions, when it should reasonably have been equipped with three-point seat[ ]belts[ ] as [were] the [vehicle's] remaining seats," and that defendants knew "of the dangers of two-point lap[ ]belts," but "failed to warn . . . consumers," including plaintiffs, "of such dangers."

Defendants answered the amended complaint and then moved for judgment on the pleadings. They argued federal preemption barred plaintiffs' allegation Thanh Williamson's death "was directly attributable to the center seat being equipped with a lap safety belt" rather than "a lap and shoulder belt" because it "directly conflict[ed] with the choice that federal law gave to manufacturers. . . ." The trial court granted the motion with leave to amend. It agreed federal law precluded a state tort action "to the extent [the] theory of liability [was] the lap[-]only seat belt," but recognized plaintiffs had sufficiently pleaded other "theories of liability as to . . . the decedent's death. . . ."

The third amended complaint substantially repeated the foregoing allegations. It described the minivan as defective, in part, because defendants "equipped [it] with an inferior and unsafe lap-only belt" for "[t]he center seating position of the middle bench seat" that "did not restrain the upper torso of decedent. . . ." It also alleged defendants breached their duty of care by "fail[ing] to adequately warn . . . about the hazards, risks, and dangers of such defects." (Capitalization omitted.) In addition, it pleaded "[t]he defects and failures alleged . . . were joint and concurrent causes of [p]laintiff[s'] injuries, such that each defect and failure cannot be evaluated and adjudicated separately but must be evaluated and adjudicated together. . . . But for the presence of all of these defects, Thanh Williamson's injuries would not have been as severe nor would she have died. . . ."

Defendants filed a demurrer and a motion to strike, reasserting the federal preemption argument. They noted this pleading conflicted with the trial court's prior ruling and also argued plaintiffs had effectively admitted "*all* of their claims – relating to Thanh Williamson – are based on" the allegation her "death ar[ose] from the lap-only belt," and thus the pleading's other theories of liability, including the failure to warn allegation, were preempted as well.

When the hearing began, the court announced it had tentatively decided to overrule the demurrer. The judge acknowledged "I have ruled . . . you can't have liability just based on [defendant's decision to install] a lap[ ]belt" and, "to the extent you . . . can find that language in [the third amended complaint] . . . I don't think [plaintiffs are] going to be able to proceed on that." But the federal preemption claim notwithstanding, the trial judge noted, "that doesn't mean that you couldn't state a cause of action" for "negligen[ce] in how you hooked it up or negligen[ce] in how you design the seat that was going to accommodate it, or any other tort theory."

However, at the request of plaintiffs' counsel, the court sustained the demurrer without leave to amend "as to all of plaintiffs' claims arising out of the death of Thanh Williamson. . . ." Counsel explained that, after "the last hearing . . . I thought long and hard after reading all the briefs . . . , considering the court's order and being the person that would try this case on behalf of plaintiffs," about "[w]hat evidence can I put on and what evidence will be barred based

on the ruling[.]" He answered this question, declaring "with the court's ruling as it presently stands, I don't think I could put on a case on behalf of my clients. I really don't. [¶] . . . [¶] If you strike all these [wrong seatbelt option] allegations, I am left with nothing. . . . [¶] . . . [¶] . . . [T]he court's ruling [is] we can't talk about the [seat]belt. But the [seat]belt is integral because had [Thanh Williamson] had the three-point belt like the two other occupants, she would be here today. They survived. [¶] . . . [¶] . . . I don't want to charge my clients the cost of . . . experts . . . and spend . . . money for a claim that is not going to have any legs if we cannot refer to the three-point versus two-point belt. We won't be able to do it. [¶] I will be trying a case" and "you . . . might as well give a nonsuit."

Subsequently, the parties stipulated to a dismissal of plaintiffs' remaining claims for personal injuries to Dexter and Alexa Williamson with prejudice. Based thereon, the trial court entered judgment for defendants.

DISCUSSION

1. Federal Preemption

"The supremacy clause of article VI of the United States Constitution grants Congress the power to preempt state law. State law that conflicts with a federal statute is '"without effect."' [Citations.]" (*Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923.) "Federal regulations

have no less pre-emptive effect than federal statutes." (*Fidelity Federal Sav. and Loan Ass'n. v. de la Cuesta* (1982) 458 U.S. 141, 153 [102 S.Ct. 3014, 73 L.Ed.2d 664].) Since "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief'" (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 521 [112 S.Ct. 2608, 120 L.Ed.2d 407]), the principles of law governing federal preemption "apply with equal force whether the state law takes the form of a legislative enactment or an award of damages through private suit. [Citations.]" (*Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1162.)

Federal preemption can arise in the following circumstances. "'First, Congress can define explicitly the extent to which its enactments pre-empt state law. . . . Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. . . . Finally, state law is pre-empted to the extent that it actually conflicts with federal law,'" either because "'it is impossible for a private party to comply with both state and federal requirements, [citation] or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."' [Citations.]" (*Dowhal v. SmithKline Beecham Consumer Healthcare, supra,* 32 Cal.4th at p. 923.) It is the latter form of federal conflict preemption that is at issue in this case.

Although defendants and amici curiae on their behalf question its applicability to a case of conflict preemption, generally "'[c]onsideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress."' [Citation.]" (*Dowhal v. SmithKline Beecham Consumer Healthcare, supra,* 32 Cal.4th at p. 923; *see also Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 958, fn. 12 [in implied preemption cases "[w]e discern no persuasive reason why the traditional presumption against preemption should be categorically inapplicable"].) On appeal from the dismissal of an action after the sustaining of a demurrer without leave to amend on the basis of federal preemption we apply a de novo standard of review. (*Credit Managers Assn. of California v. Countrywide Home Loans, Inc.* (2006) 144 Cal.App.4th 590, 593.)

2. The Safety Act

Congress enacted the Safety Act in 1966 "to reduce traffic accidents and deaths and injuries resulting from traffic accidents," in part, by "prescrib[ing] motor vehicle safety standards for motor vehicles and motor vehicle equipment. . . . " (49 U.S.C. § 30101(1); former 15 U.S.C. § 1381.) To accomplish this purpose, Congress directed the United States Department of Transportation (DOT) to "prescribe motor vehicle safety standards" (49 U.S.C. § 30111(a)) taking into consideration "relevant

available motor vehicle safety information[,] . . . [¶] . . . [¶] . . . whether a proposed standard is reasonable, practicable, and appropriate for the . . . type of motor vehicle or motor vehicle equipment for which it is prescribed[,] and [¶] . . . the extent to which the standard will carry out [the declared purposes] of this [Act]." (49 U.S.C. § 30111(b)(1), (3) & (4); *see also Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (1983) 463 U.S. 29, 33-34 [103 S.Ct. 2856, 77 L.Ed.2d 443].) DOT subsequently delegated the authority to promulgate these rules to the National Highway Traffic Safety Administration (NHTSA). (49 C.F.R. § 1.50(a); *Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., supra,* 463 U.S. at p. 34, fn. 3.)

One of the standards promulgated under the Safety Act is FMVSS 208. It "specifies performance requirements for the protection of vehicle occupants in crashes." (49 C.F.R. § 571.208, S1 (2008).)

Originally FMVSS 208 declared that, other than the driver's side and outboard front passenger seats, a manufacturer could install either "a Type 1 [lap-only] or Type 2 [lap/shoulder] seat belt assembly . . . in each passenger car seat position." (32 Fed.Reg. 2415 (Feb. 3, 1967).) In the early 1980's, NHTSA received a petition to extend the lap/shoulder seatbelt requirement to rear seating positions. (53 Fed.Reg. 47982-47983 (Nov. 29, 1988).) NHTSA declined the request, citing compatibility issues between lap/shoulder belts and then popular child restraint systems, plus a finding "the benefits, if any, to be

gained . . . with Type 2 belts for adults would not justify the additional cost of requiring the installation of Type 2 belts in these positions." (49 Fed.Reg. 15241 (Apr. 18, 1984).)

After receiving a second petition, NHTSA reconsidered the issue and in 1988 announced a rule change extending the lap/shoulder seatbelt requirement to rear outboard seating positions of most vehicles, including multipurpose passenger vehicles. (53 Fed.Reg. 47983, 47985-47986, 47992-47993 (Nov. 29, 1988).) NHTSA supported this rule change by citing the "estimate of the costs involved with such a requirement ha[d] changed substantially . . . because of the significant increase in the number of vehicles . . . voluntarily equipped with rear seat lap/shoulder belts," a nationwide increase in seatbelt usage that rendered "the benefits of rear seat lap/shoulder belts . . . reasonably related to the costs" of their installation, and a finding that "lap/shoulder belts in the rear seat would provide better protection for children restrained in booster seats." (53 Fed.Reg. 47983, 47984 (Nov. 29, 1988).)

At the same time NHTSA considered, but rejected, a proposal to require lap/shoulder belts at rear inboard seating positions. Citing the potential need for manufacturers to make structural changes to some vehicles, the increased costs of installing lap/shoulder seatbelts, and the limited use of that seating position, NHTSA concluded the "small safety benefits" resulting from extending the lap/shoulder seatbelt requirement to rear center seating positions

did not outweigh the resulting "technical difficulties" and "substantially greater costs." (53 Fed.Reg. 47984 (Nov. 29, 1988).) Thus, when defendants manufactured plaintiffs' 1993 MPV Minivan, FMVSS 208 declared all "multipurpose passenger vehicles . . . shall meet the requirements of S4.1.2.1," which authorized either "a Type 1 [lap-only] or Type 2 [lap/shoulder] seat belt assembly," except in "forward-facing rear outboard designated seating position[s]," which "shall be equipped with an integral Type 2 seat belt. . . ." (Former 49 C.F.R. § 571.208, S4.1.2.1(b), S4.2.2, S4.2.3, S4.2.4 (1992), 53 Fed.Reg. 47992-47993.)

3. FMVSS 208's Application to This Case

The question presented here is whether FMVSS 208 preempts the present lawsuit because a common law action seeking to hold defendants liable for installing a lap-only seatbelt at a rear inboard passenger seat conflicts with the safety standard.

The Safety Act contains a preemption clause, declaring, "When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter." (49 U.S.C. § 30103(b)(1).) But this statute also contains a savings clause that states "[c]ompliance with a motor

vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." (49 U.S.C. § 30103(e).)

In *Ketchum v. Hyundai Motor Co.* (1996) 49 Cal.App.4th 1672, 57 Cal.Rptr.2d 595, a front-seat passenger was injured in a crash while wearing a two-point automatic shoulder belt without a lapbelt. The defendant argued the lawsuit was preempted because the then-applicable version of FMVSS 208 authorized this type of passenger crash protection. Describing FMVSS 208 as a "minimum standard[ ] for motor vehicle safety" (*Ketchum v. Hyundai Motor Co., supra,* 49 Cal.App.4th at p. 1679), and citing the Safety Act's savings clause, the Court of Appeal rejected the preemption claim. "In the preemption clause, Congress precludes the states from establishing or continuing any motor vehicle 'safety standard applicable to the same aspect of performance.' [Citation.] . . . The savings clause [citation] provides that compliance with a 'safety standard' issued under the Safety Act does not exempt a person from 'liability under common law.' Congress clearly distinguished between motor vehicle safety standards, which are preempted, and common law standards for liability, which are not. This language unambiguously expresses the intent of Congress to preserve common law liability actions." (*Id.* at p. 1680.)

But in *Geier v. American Honda Motor Company, Inc., supra,* 529 U.S. 861, the Supreme Court rejected this approach. There the plaintiff suffered injury in a front-end collision. Although the vehicle was equipped

with both shoulder and lap seat belts, she sued the defendants alleging the car was defective because it lacked an airbag. The defendants argued the then-applicable version of FMVSS 208, which made installation of an airbag optional, preempted the lawsuit.

Initially, *Geier* rejected the defendants' express preemption claim by reconciling the preemption and savings clause provisions: "'[A] reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate – for example, where federal law creates only a floor, *i.e.*, a minimum safety standard. [Citation.]'" (*Geier v. American Honda Motor Company, Inc., supra,* 529 U.S. at p. 868.)

Geier also announced two further holdings relevant to this case. First, it concluded "[n]othing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations" (*Geier v. American Honda Motor Company, Inc., supra,* 529 U.S. at p. 869) and thus it "does *not* bar the ordinary working of conflict pre-emption principles." (*Ibid.*)

Second, *Geier* held "a common-law 'no airbag' action like the one before us actually conflicts with FMVSS 208." (*Geier v. American Honda Motor Company, Inc., supra,* 529 U.S. at p. 874.) In reaching this conclusion, *Geier* reviewed FMVSS 208's history and DOT's explanation for its decision not to require airbags in all vehicles. (*Id.* at pp. 875-880.) The court

rejected the "view [that] FMVSS 208 sets a minimum airbag standard. . . . The . . . [ ]DOT's[ ] comments, which accompanied the promulgation of FMVSS 208, make clear that the standard deliberately provided the manufacturer with a range of choices among different passive restraint devices," that "would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance – all of which would promote FMVSS 208's safety objectives. [Citation.]" (*Id.* at pp. 874-875.)

Geier thus found the regulation "'embodies the Secretary [of Transportation]'s policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car.' [Citation.] Petitioners' tort suit claims that the manufacturers . . . 'had a duty to design, manufacture, distribute and sell a motor vehicle with an effective and safe passive restraint system, including, but not limited to, airbags.' [Citation.] [¶] In effect, petitioners' tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured the [car]. Such a state law – *i.e.*, a rule of state tort law imposing such a duty – by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors. It thereby would have presented an obstacle to the

variety and mix of devices that the federal regulation sought. . . . Because the rule of law for which petitioners contend would have stood 'as an obstacle to the accomplishment and execution of' the important means-related federal objectives that we have just discussed, it is pre-empted. [Citations.]" (*Geier v. American Honda Motor Company, Inc., supra,* 529 U.S. at pp. 881-882.)

While *Geier* is distinguishable because it dealt with passive restraints, not seatbelts, its analysis of FMVSS 208 rejected *Ketchum's* approach in determining the preemptive effect of that safety standard. Furthermore, subsequent appellate decisions involving tort actions challenging the use of lap-only seatbelts have followed *Geier* and held these lawsuits are preempted under FMVSS 208. In *Hurley v. Motor Coach Industries, Inc.* (7th Cir. 2000) 222 F.3d 377, the court ruled a bus driver's action against the vehicle's manufacturer for installing a lap-only seatbelt was preempted. "*Geier* noted the controversy over the efficacy and utilization of airbags and seat belts and concluded that FMVSS 208 'deliberately sought variety' by leaving the choice of passenger protection system up to manufacturers. [Citation.]" (*Id.* at p. 382.) In *Griffith v. General Motors Corp.* (11th Cir. 2002) 303 F.3d 1276, the court held FMVSS 208 preempted a design defect claim asserted by a plaintiff injured in an accident while seated in the front center seat of a truck wearing a lap-only seatbelt. (*Id.* at p. 1283.)

More apropos to this case, three other appellate decisions have applied *Geier's* approach to hold defective design lawsuits challenging an automobile manufacturer's use of a lap-only seatbelt at the inboard position of a passenger vehicle's rear seat were preempted by FMVSS 208. (*Carden v. General Motors Corp.* (5th Cir. 2007) 509 F.3d 227, 231-232; *Roland v. General Motors Corp.* (Ind.Ct.App. 2008) 881 N.E.2d 722, 727; *Heinricher v. Volvo Car Corp.* (2004) 61 Mass.Ct.App. 313 [809 N.E.2d 1094, 1098].)

These decisions considered and rejected many of the arguments raised by plaintiffs in this appeal. For example, citing the statutory definition of a motor vehicle safety standard and language appearing in the NHTSA's explanations of its rule-making decisions, plaintiffs describe FMVSS 208's regulations governing the installation of seatbelts as minimum standards. *Carden* rejected a similar claim: "A review of the regulatory and rule making history of FMVSS 208 supports the conclusion that the NHTSA's decision to allow car manufacturers the option to install either lap-only or lap/shoulder seat belts in the rear center seating position of passenger vehicles was deliberate, and the agency identified specific policy reasons for its decision. . . . [W]hen FMVSS 208 was initially promulgated, the DOT required either lap-only or lap/shoulder seat belts in each seating position in passenger vehicles. [Citation.] As technology advanced and seatbelt use became more widespread, seatbelt requirements evolved. In 1989, noting the decreased cost and increased use of seatbelts in rear

seating positions, the NHTSA amended FMVSS 208 to require the use of lap/shoulder seat belts in rear outboard seating. [Citation.] The commentary preceding the final rules indicates that the NHTSA considered comments suggesting that lap/shoulder seat belts be required in the rear center seating position as well, but decided to leave manufacturers the option to select between lap-only and lap/shoulder belts. [Citation.] In excluding the rear center seat from this requirement, the agency explained that 'there [were] more technical difficulties associated with any requirement for lap/shoulder belts at center rear seating positions, and that lap/shoulder belts at center rear seating positions would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task.' [Citation.] Based on this language, it is clear that the agency's decision was deliberate and based on managing technological constraints and cost efficiency." (*Carden v. General Motors Corp., supra,* 509 F.3d at pp. 231-232, fns. omitted.)

Plaintiffs also assert that "[u]nlike *Geier,* this case does *not* involve airbags, passive restraint devices, or the unique policy judgments made by NHTSA when it promulgated the . . . version of FMVSS 208 governing passive restraints." *Griffith* rejected the argument that *Geier* was limited to lawsuits involving a manufacturer's choice between passive restraint options. "[T]he Supreme Court . . . framed the issue as one of intent. In implementing

the Congressional mandate to reduce the number of vehicular deaths, did DOT intend to establish only certain minimum safety standards, beyond which a state would be free to require more, or did it deliberately design a regulatory scheme which provides specific passenger restraint options, no one of which would state law be free to foreclose? [¶] In *Geier*, the Court found that the rule-making history of FMVSS 208 makes clear that DOT saw it not merely as a minimum standard, but as a comprehensive regulatory scheme. [Citation.] DOT intended and expected FMVSS 208 to produce a mix of restraint devices, both passive and manual, in cars and trucks. [Citation.] DOT's own contemporaneous explanation of FMVSS 208 was that it believed this mix would maximize the likelihood that people would actually use the passenger restraint systems installed in their cars and trucks. [Citations.]" (*Griffith v. General Motors Corp., supra,* 303 F.3d at pp. 1280-1281, fn. omitted; *see also Roland v. General Motors Corp., supra,* 881 N.E.2d at p. 727 ["NHTSA's regulation of seat belt use was motivated by the same policy concerns . . . identified in *Geier* as the basis for the agency's decision to permit various passive restraint options: safety and consumer acceptance (with respect to child restraints), technical difficulties (including issues as to anchor locations and possible interference with the rear view mirror), and lowering costs to encourage technological developments"].)

A third argument plaintiffs assert is that this case is governed by the United States Supreme

Court's later decision in *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51 [123 S.Ct. 518, 154 L.Ed.2d 466]. *Sprietsma* arose from the death of a woman after she fell off a boat and was struck by the blades of the boat's outboard motor. Her husband sued the motor's manufacturer, alleging the product was unreasonably dangerous because it lacked a propeller guard. In state court, the defendant succeeded in having the lawsuit dismissed on the ground it was preempted under the Federal Boat Safety Act of 1971 (46 U.S.C. § 4301 et seq.) because the United States Coast Guard, which had the authority to issue regulations under the Act, had studied the issue and chosen not to adopt a regulation requiring the installation of propeller guards.

The United States Supreme Court reversed. In response to the defendant's claim of implied preemption arising from the Coast Guard's inaction, it noted, "The Coast Guard's decision *not* to impose a propeller guard requirement presents a sharp contrast to the decision of the Secretary of Transportation that was given pre-emptive effect in *Geier*. . . ." (*Sprietsma v. Mercury Marine, supra,* 537 U.S. at p. 67.) Thus "[i]t is quite wrong to view that decision as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation. The decision . . . to 'take no regulatory action,' [citation], left the law applicable to propeller guards exactly the same as it had been before the subcommittee began its investigation. . . . [¶] Indeed, history teaches us that a Coast Guard decision not to

regulate a particular aspect of boating safety is fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standards." (*Id.* at p. 65.)

As explained in *Carden v. General Motors Corp., supra,* 509 F.3d 227, "*Sprietsma* involved a complete absence of regulatory action, which was not the case here. As discussed above, the [NHTSA] identified particular policy reasons for its decision to allow manufacturers the option of selecting between the two seat belt designs, and included this option as a part of a comprehensive regulatory scheme. [Citation.] Thus, *Sprietsma* does not control." (*Id.* at p. 232; *see also Roland v. General Motors Corp., supra,* 881 N.E.2d at pp. 728-729.)

Plaintiffs also claim *Sprietsma* stands for the proposition that NHTSA's "analysis of technical feasibility, costs, and relative safety benefits" does not "reflect any authoritative message of federal policy against lap/shoulder belts in rear-center seats." This argument misstates the Supreme Court's opinion in *Sprietsma.* After quoting the Coast Guard's explanation for rejecting a propeller guard requirement and discussing the reasons given by that agency, the court concluded "although the Coast Guard's decision . . . was undoubtedly intentional and carefully considered, it does not convey an 'authoritative' message of a federal policy against propeller guards." (*Sprietsma v. Mercury Marine, supra,* 537 U.S. at p. 67.) Thus, *Sprietsma* does not bar a federal regulation from having a preemptive effect simply because the agency

employs a "cost-benefit analysis" to reach its decision. In fact, by statute, DOT and NHTSA are required to consider factors such as feasibility and cost in issuing motor vehicle safety standards. (49 U.S.C. § 30111(b)(1), (3) & (4).)

Plaintiffs also rely on *Chevere v. Hyundai Motor Co.* (App.Div. 2004) 4 A.D.3d 226 [774 N.Y.S.2d 6]. *Chevere* involved an action where a passenger, wearing an automatic seatbelt but not the available manual lapbelt, died in what the appellate division described as "an 'ordinary, easily survivable' intersection collision at no more than moderate speed . . . " in which "the adequacy of the restraint system in plaintiff's vehicle was a crucial factor in the assessment of liability against the . . . defendants." (*Id.* at p. 7.) The court rejected the defendants' preemption defense, declaring "*Geier* does not automatically exempt automobile manufacturers from liability whenever a federal regulation provides them with options as to the type of restraint system to be employed. Nothing in that decision bars allegations of strict products liability, breach of warranty and negligence in a state action. *Geier* precludes actions alleging a general failure to equip a vehicle properly, but does not preclude common-law claims against a manufacturer who has unreasonably opted to meet only minimum performance requirements [citation]." (*Ibid.*)

Chevere is questionable because the foregoing statement is conclusory and lacks any supporting analysis for its interpretation of *Geier*. In any event, *Chevere* is distinguishable. The only legal authority

the New York court cited to support its holding is a pre-*Geier* decision, *King v. Ford Motor Co.* (6th Cir. 2000) 209 F.3d 886. *King* rejected the defendants' preemption argument because the "'plaintiffs' position was not that the design choice made by defendants for protecting against frontal collisions – an automatic shoulder belt and knee bolster – was inherently defective but that the specific design was defective due to failure to use load limiters and/or change the location of the knee bolster and/or change the location of the belt anchor." (*Id.* at p. 892.)

King was premised on a theory the specific vehicle involved in the accident had a structural design flaw, not that the defendant had chosen the wrong passenger restraint option. The limited factual summary in *Chevere* suggests it may well have involved a similar theory of recovery. Furthermore, this approach is consistent with *Geier*. There, the Supreme Court recognized "[i]t is possible that some special design-related circumstance concerning a particular kind of car might require airbags, rather than automatic belts, and that a suit seeking to impose that requirement could escape pre-emption – say, because it would affect so few cars that its rule of law would not create a legal 'obstacle' to [FMVSS] 208's mixed-fleet, gradual objective. But that is not what petitioners claimed. They have argued generally that, to be safe, a car must have an airbag. [Citation.]" (*Geier v. American Honda Motor Company, Inc., supra,* 529 U.S. at pp. 885-886; *see also Jamison v. Ford Motor Co.* (S.C.Ct.App. 2007) 373 S.C. 248

[644 S.E.2d 755, 764] ["'compliance with performance criteria does not immunize manufacturers from common law liability arising from any defects in the production or design of their . . . restraint systems'"].)

Plaintiffs allege defendants defectively designed the minivan, in part, by equipping "[t]he center seating position of the middle bench seat . . . with an inferior and unsafe lap-only belt that did not provide adequate protection in frontal collisions because it did not restrain the upper torso of decedent Thanh Williamson. . . . " In effect, they seek to hold defendants liable for choosing the lap-only seatbelt option for the middle center seat position. If successful, plaintiffs' claim would bar motor vehicle manufacturers from employing one of the passenger restraint options authorized by FMVSS 208 because it would effectively require them to install only lap/shoulder seatbelts at inboard seating positions to avoid liability under California law. Such a result would "stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in [FMVSS] 208" (*Heinricher v. Volvo Car Corp., supra,* 809 N.E.2d at p. 1098) and is therefore preempted.

The United States Supreme Court's decision in *Geier* is binding on us (*Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 782) but, as noted, *Geier* is distinguishable because it dealt with passive restraints. The post-*Geier* cases considering FMVSS 208's preemptive effect on an automobile manufacturer's choice of passenger restraint systems are not controlling precedent in California. (*Ritschel v. City of*

Fountain Valley (2006) 137 Cal.App.4th 107, 120 [even when interpreting federal law the "'[d]ecisions of lower federal courts . . . are not binding on state courts'"]; *Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070, 1077 ["Decisions of the courts of other states are only regarded as 'persuasive . . . depending on the point involved'"]; *Forsyth v. Jones, supra,* 57 Cal.App.4th at p. 782 ["'decisions of the lower federal courts, while persuasive, are not binding on us'"].) However, these cases have almost uniformly found FMVSS 208 preempts common law actions alleging a manufacturer chose the wrong seatbelt option and we find their analysis to be persuasive. Therefore, we conclude that to the extent plaintiffs contend defendants are liable for failing to install a lap/shoulder seatbelt in the minivan's middle row inboard seat, their claim is barred by the version of FMVSS 208 in effect when defendants manufactured the minivan.

4. Plaintiffs' Remaining Theories of Recovery

Plaintiffs note the third amended complaint alleged other design defect claims not covered by FMVSS 208, including a lap-only belt "anchored at an unsafe angle," several "seating positions" "unreasonably susceptible to ramping and submarining of passengers" because of "[t]he angle, geometry, and composition of the seat bottom," "seat backs" incapable of "sufficiently withstand[ing] foreseeable forces in a frontal collision," and the vehicle's lack of "sufficient energy-absorbing materials and structures to

absorb reasonable amounts of force from a frontal collision. . . ." In addition, citing the principle that "a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes 'defective' simply by the absence of a warning" (*Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 347), plaintiffs contend their failure to warn theory is not preempted by FMVSS 208. Thus, they argue, "even if this court finds that the lap/shoulder belt theory is preempted, the judgment should still be reversed and the case remanded for further proceedings on the other remaining theories of liability."

Plaintiffs waived these claims. They stipulated to dismiss with prejudice all injury claims relating to plaintiffs Delbert and Alexa Williamson. As for Thanh Williamson's death, plaintiffs acknowledged both in the third amended complaint and at the hearing on the demurrer that without the ability to challenge defendants' failure to install a lap/shoulder seatbelt they could not proceed on the remaining theories of liability. The third amended complaint declared all "[t]he defects . . . alleged . . . were joint and concurrent causes . . . such that each defect . . . cannot be evaluated and adjudicated separately but must be evaluated and adjudicated together." Consequently, "the injuries to Thanh Williamson were the result of all of the defects" and, "[b]ut for the presence of all of these defects, [her] injuries would not have been severe nor would she have died. . . ."

At the hearing on the demurrer, the trial judge expressed his opinion the inability to hold defendants "liable for choosing a two-point seatbelt instead of a three-point seatbelt" did not "mean that [they] couldn't state a cause of action based" on "any other tort theory." Defense counsel even agreed with this observation, stating, "We are not arguing that they are preempted from alleging that the seat[ ]back in the vehicle is defective. [¶] We're not arguing that they're preempted from saying the seat cushion is defective or the vehicle structure is defective." But in response, plaintiffs' attorney declared "with the court's ruling as it presently stands, I don't think I could put on a case on behalf of my clients," explaining "the [seat]belt is integral" to the case, and "[i]f you strike all these [defective seatbelt] allegations, I am left with nothing."

In light of the concessions contained in the third amended complaint and counsel's comments, plaintiffs' alternative theories of recovery are also barred by federal preemption. (*Carden v. General Motors Corp., supra,* 509 F.3d at p. 233 [where failure to warn and other defect claims are "premised on defective design claims found to be preempted," they are "also preempted federal law"]; *Irving v. Mazda Motor Corp.* (11th Cir. 1998) 136 F.3d 764, 769-770 [where the plaintiff "tied the claims of defective design and failure to warn together" and the "defective-design claim is preempted by FMVSS 208, there was no defect about which to warn"]; *Roland v. General Motors Corp., supra,* 881 N.E.2d at pp. 729-730

["misrepresentation and failure to warn claims" preempted where they "depend on . . . contention that a lap belt is defective and are a roundabout attempt to challenge the choice provided by FMVSS 208 as part of a comprehensive regulatory scheme"].) Therefore, the trial court properly sustained the demurrer without leave to amend as to the allegations of Thanh Williamson's injuries and death.

DISPOSITION

The judgment is affirmed. Respondents' request that we take judicial notice of portions of the Federal Register relating to FMVSS 208 is granted. Respondents are entitled to recover their costs on appeal.

CERTIFIED FOR PUBLICATION

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DELBERT WILLIAMSON et al., Plaintiffs and Appellants, v. MAZDA MOTOR OF AMERICA, INC. et al., Defendants and Respondents.	G038845 (Super. Ct. No. 04CC06494) ORDER MODIFYING OPINION AND DENYING REHEARING; NO CHANGE IN JUDGMENT (Filed Nov. 18, 2008)

It is ordered that the opinion filed herein on October 22, 2008 be modified in the following particulars:

1. On page 9, in the first full paragraph starting with "The question presented" delete the phrase "in the center middle row" appearing in the third line and replace it with "at a rear inboard" so that the sentence reads:

"The question presented here is whether FMVSS 208 preempts the present lawsuit because a common law action seeking to hold defendants liable for installing a lap-only seatbelt at a rear inboard passenger seat conflicts with the safety standard."

2. On page 12, in the first full paragraph starting with "More apropos to this case" delete the phrase "in the center" appearing on the third line and replace it with "at the inboard" so that the sentence reads:

"More apropos to this case, three other appellate decisions have applied *Geier's* approach to hold defective design lawsuits challenging an automobile manufacturer's use of a lap-only seatbelt at the inboard position of a passenger vehicle's rear seat were preempted by FMVSS 208."

3. On page 17, in the second sentence of the first full paragraph starting with "Plaintiffs allege defendants defectively" delete the phrase "the middle center" and replace it with "a rear inboard" so that the sentence reads:

"In effect, they seek to hold defendants liable for choosing the lap-only seatbelt option for a rear inboard seat position."

4. On page 18, in the last sentence of the top paragraph starting with "federal courts . . . " delete the word "center" and replace it with "inboard" so that the sentence reads:

"Therefore, we conclude that to the extent plaintiffs contend defendants are liable for failing to install a lap/shoulder seatbelt in the minivan's middle row inboard seat, their claim is barred by the version of FMVSS 208 in effect when defendants manufactured the minivan."

The petition for rehearing is DENIED.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P.J.

IKOLA, J.

Court of Appeal, Fourth Appellate District,
Div. 3 – No. G038845

S168717

IN THE SUPREME COURT OF CALIFORNIA

En Banc

DELBERT WILLIAMSON et al.,
Plaintiffs and Appellants,

v.

MAZDA MOTOR OF AMERICA, INC. et al.,
Defendants and Respondents.

(Filed Feb. 11, 2009)

The petition for review is denied.

Werdegar, J. was absent and did not participate.

GEORGE
Chief Justice